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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 MICHELE D. BUTTS,)
09 Plaintiff,) CASE NO. C11-1556-TSZ-MAT
10 v.)
11 MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
12 Defendant.) APPEAL
13 _____)

14 Plaintiff Michele D. Butts proceeds through counsel in her appeal of a final decision of
15 the Commissioner of the Social Security Administration (Commissioner). The Commissioner
16 denied plaintiff's applications for Supplemental Security Income (SSI) and Disability
17 Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having
18 considered the ALJ's decision, the administrative record (AR), and all memoranda of record,
19 the Court recommends that this matter be REMANDED for an award of benefits.

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01 **FACTS AND PROCEDURAL HISTORY**

02 Plaintiff was born on XXXX, 1962.¹ She obtained her GED and previously worked in
03 data entry, performed the duties of a bookkeeper and secretary, and has past experience as a
04 nurse's aide. (AR 112-14, 220.)

05 Plaintiff filed applications for DIB and SSI in April and July 2008 respectively, alleging
06 disability since April 30, 2007. (205-09.) Her applications were denied initially and on
07 reconsideration, and she timely requested a hearing.

08 On June 7, 2010, ALJ Gary J. Suttles held a hearing, taking testimony from plaintiff, a
09 medical expert, plaintiff's mother, and a vocational expert. (AR 42-121.) On June 23, 2010,
10 the ALJ issued a decision finding plaintiff not disabled. (AR 26-38.)

11 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
12 on July 1, 2011 (AR 1-3), making the ALJ's decision the final decision of the Commissioner.
13 Plaintiff appealed this final decision of the Commissioner to this Court.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
19 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
20 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be

21 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of
22 Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case
Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 determined whether a claimant suffers from a severe impairment. The ALJ found severe
02 plaintiff's fibromyalgia, cervical degenerative disc disease, degenerative joint disease of the
03 right knee, heart disease with pacemaker implantation, depression, anxiety, somatization
04 disorder, and personality disorder. Step three asks whether a claimant's impairments meet or
05 equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal
06 the criteria of a listed impairment.

07 If a claimant's impairments do not meet or equal a listing, the Commissioner must
08 assess residual functional capacity (RFC) and determine at step four whether the claimant has
09 demonstrated an inability to perform past relevant work. The ALJ found plaintiff capable of
10 performing light work as defined in 20 C.F.R. §§ 404.1567(b), 416.967(b) (lift and carry twenty
11 pounds occasionally and ten pounds frequently, sit, stand, and/or walk six hours in an eight
12 hour day, with ordinary work breaks, i.e. morning, afternoon, and lunch breaks), but limited her
13 to walking for only four hours in an eight hour day and requiring the need to shift at will
14 between sitting and standing. He further limited plaintiff to only occasional pushing with her
15 lower extremities; occasional overhead reaching; unable to run or climb ladders, ropes, or
16 scaffolds; only occasional bending, stooping, crouching, crawling, balancing, twisting,
17 squatting, and stair climbing; and having only limited exposure to excessive cold, heights,
18 dangerous machinery, and uneven surfaces. The ALJ also concluded that, mentally, plaintiff
19 is capable of getting along with others, understanding simple instructions, concentrating and
20 performing simple tasks, and responding and adapting to workplace changes and supervision,
21 but in a limited public/employee contact setting. With that assessment, the ALJ found plaintiff
22 unable to perform any past relevant work.

01 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
02 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
03 an adjustment to work that exists in significant levels in the national economy. Considering
04 the Medical-Vocational Guidelines and with the assistance of the vocational expert, the ALJ
05 found plaintiff capable of performing other jobs, such as work as a photo copy machine
06 operator, small parts assembler, and office helper.

07 This Court's review of the ALJ's decision is limited to whether the decision is in
08 accordance with the law and the findings supported by substantial evidence in the record as a
09 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
10 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
11 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
12 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
13 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
14 F.3d 947, 954 (9th Cir. 2002).

15 Plaintiff argues² the ALJ erred in his consideration of the medical evidence, the lay
16 testimony, her credibility, and in proffering a deficient hypothetical to the vocational expert.
17 She requests remand for an award of benefits. The Commissioner concedes all of these
18 reversible errors, but disagrees with the request for an award of benefits, arguing the matter
19 should be remanded for further administrative proceedings. The Commissioner also notes that

20 2 Plaintiff's Opening Brief contains a lengthy statement of facts and procedural history, totaling
21 three quarters of the brief. The Court has full access to the administrative record and all the hearing
22 exhibits. A lengthy summary of the record by either party serves no useful function, and violates this
Court's scheduling order. (Dkt. 10 at 2 ("The parties shall not include a lengthy recitation of
background facts or medical evidence. Rather, a discussion of the relevant facts should be
included in the context of specific assignments of error.") (emphasis in original).)

01 plaintiff is ineligible for SSI for any month including and preceding July 2008, the month she
02 filed her SSI application, 20 C.F.R. §§ 416.330, 416.335, and ineligible for DIB for any month
03 preceding September 2006, twelve months before her application, 20 C.F.R. § 404.621.

04 The Court has discretion to remand for further proceedings or to award benefits. *See*
05 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of
06 benefits where “the record has been fully developed and further administrative proceedings
07 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.
08 2002).

09 Such a circumstance arises when: (1) the ALJ has failed to provide legally
10 sufficient reasons for rejecting the claimant’s evidence; (2) there are no
11 outstanding issues that must be resolved before a determination of disability can
be made; and (3) it is clear from the record that the ALJ would be required to
find the claimant disabled if he considered the claimant’s evidence.

12 *Id.* at 1076-77. For the reasons described below, this matter should be remanded for an award
13 of benefits.

14 The ALJ, as conceded by the Commissioner, failed to adequately evaluate the medical
15 record, the lay witness evidence, and plaintiff’s credibility, thereby implicating the RFC
16 assessment, the hypothetical proffered to the vocational expert, and the resulting step five
17 decision. The insufficiently evaluated medical record includes supportive opinions from
18 treating physician Dr. Daniel Conrad (AR 623-25), examining physician Dr. Daniel Neims (AR
19 612-21), testifying medical expert Dr. Kenneth Asher (AR 89-112), and examining psychiatrist
20 Dr. James Hughes (AR 815-20), the latter of which was considered only by the Appeals
21 Council. Plaintiff argues that, if credited as true, the opinions of these physicians support an
22 award of benefits.

01 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
02 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*
03 *v. Chater*, 81 F.3d 821, 830-34 (9th Cir. 1996) (finding that, if doctors’ opinions and plaintiff’s
04 testimony were credited as true, plaintiff’s condition met a listing) (quoting *Hammock v.*
05 *Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is
06 appropriate when, taking that opinion as true, the evidence supports a finding of disability.
07 *See, e.g., Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000)
08 (“When the lay evidence that the ALJ rejected is given the effect required by the federal
09 regulations, it becomes clear that the severity of [plaintiff’s] functional limitations is sufficient
10 to meet or equal [a listing.]”); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996) (ALJ’s
11 reasoning for rejecting subjective symptom testimony, physicians’ opinions, and lay testimony
12 legally insufficient; finding record fully developed and disability finding clearly required).

13 Courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*
14 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
15 were insufficient findings as to whether plaintiff’s testimony should be credited as true).
16 Therefore, applying the “credit-as-true” rule “is not mandatory when, even if the evidence at
17 issue is credited, there are ‘outstanding issues that must be resolved before a proper disability
18 determination can be made.’” *Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (quoting
19 *Vasquez v. Astrue*, 572 F.3d 586, 593 (9th Cir. 2009)). *See also Barbato v. Commissioner of*
20 *Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (“In some cases, automatic reversal
21 would bestow a benefits windfall upon an undeserving, able claimant.”; remanding for further
22 proceedings where the ALJ made a good faith error, in that some of his stated reasons for

01 rejecting a physician's opinion were legally insufficient). On the other hand:

02 [T]he district court should credit evidence that was rejected during the
03 administrative process and remand for an immediate award of benefits if (1) the
04 ALJ failed to provide legally sufficient reasons for rejecting the evidence; (2)
05 there are no outstanding issues that must be resolved before a determination of
06 disability can be made; and (3) it is clear from the record that the ALJ would be
07 required to find the claimant disabled were such evidence credited.

08 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (cited sources omitted).

09 In this case, Dr. Neims assessed a number of marked limitations in plaintiff's abilities:
10 performing activities within a schedule, maintaining regular attendance, and being punctual
11 within customary tolerances; completing a normal workday and workweek without interruption
12 from psychological symptoms and performing at a consistent pace without an unreasonable
13 number and length of rest periods; accepting instructions and responding appropriately to
14 criticism from supervisors; getting along with coworkers or peers; setting realistic goals and
15 making plans independently of others; and traveling in unfamiliar places and using public
16 transportation. (AR 621.) A "marked limitation" as considered by Dr. Neims meant:
17 "Generally able to perform the designated task or function, but with noticeable difficulty
18 [(meaning the individual is distracted from the job activities or the quality of performance
19 would be likely to attract negative attention from a supervisor)] affecting function 2-4 hours in
20 an average workday or 10-20 hours in an average workweek." (AR 620.)

21 Also, Dr. Asher testified to his opinion that plaintiff would be markedly limited,
22 meaning about "a third of the time, roughly 10 days a month, more or less", in her activities of
daily living and with respect to concentration persistence, and pace. (AR 110.) He added:
"And she would not be able to perform – her concentration, persistence, and pace in a broad

sense, her cognitive performance, would be – she just wouldn’t be able to function.” (*Id.*)³

The vocational expert testified that a person missing two or more days a month over a three month period would not be able to sustain employment. (AR 118.) He further testified that an individual would not be able to sustain employment if he or she, for two hours in an average day or ten hours in an average week, had difficulties in performing scheduled activities, maintaining regular attendance, and being punctual within customary tolerances. (*Id.*) Likewise, an individual who had difficulty accepting instructions and responding appropriately to criticism and supervisors, two hours a day or ten hours a week, would not be able to sustain employment. (AR 118-19.) Accordingly, as argued by plaintiff, the opinions of Dr. Neims and Dr. Asher, if credited as true, support a finding of disability at step five when considered in conjunction with the testimony of the vocational expert.

None of the Commissioner’s arguments in opposition to an award of benefits are persuasive. The Commissioner observes that Dr. Neims, after assessing marked limitations in the check-box portion of the form completed, did not, in the second portion of the form, provide any “detailed explanation of the degree of limitation for each category, as well as any other assessment information” deemed appropriate. (AR 620-21.) However, the Commissioner entirely ignores the fact that, while leaving blank the small portion of the form provided for narrative explanation, Dr. Neims attached a seven page report containing detailed descriptions of plaintiff’s medical and other history, the mental status evaluation conducted, testing results

³ The ALJ assigned “little weight” to Dr. Asher’s opinions because “[t]hough Dr. Asher has testified as an impartial medical expert at Social Security hearings for more than ten years, he was paid to appear and testify at this hearing on the claimant’s behalf, without ever having examined the claimant.” (AR 31.) The Commissioner does not argue that Dr. Asher’s opinion was entitled to less weight because he was, in this particular case, hired by plaintiff, rather than the Commissioner.

01 and his interpretation, diagnostic impressions, and his conclusions and recommendations.
02 (AR 612-18.) Dr. Neims described plaintiff's anxious, guarded, and passive aggressive
03 presentation, and her marked and moderate-to-marked testing scores for depression and
04 anxiety. (AR 612-17.) He provided a detailed explanation of his conclusions, including,
05 *inter alia*, that plaintiff was "clearly focused on somatic issues[,] that a pain disorder diagnosis
06 reflected the "impact of both somatic and psychological components of her presenting issues[]" and suggested "that if physiological aspects of pain concerns surpass those predicted by her
07 providers that a psychological component may well be present[,] and that plaintiff was "seen
08 as disabled from sustained gainful employment for the foreseeable 12 months or longer, with
09 chief difficulties centering in areas of social factors and adaptation." (AR 617-18.) Given the
10 existence of this detailed explanation, the Commissioner provides no basis for further
11 evaluation of the opinions of Dr. Neims on remand.

13 Nor does the Commissioner otherwise support the averred need for further
14 consideration of the medical record. The Commissioner states that, while opining as to
15 plaintiff's disability in November 2009, Dr. Conrad did not explain how and why the objective
16 medical evidence supported such a conclusion. However, Dr. Conrad did provide an
17 explanation for his opinion, stating:

18 It is my opinion that Ms. Butts honestly reports her subjective symptoms for
19 treatment purposes. She has one of the more severe cases of fibromyalgia
20 syndrome that I have seen in my practice, and she does have significant
21 limitations associated with that condition. My assessment of the severity of her
22 fibromyalgia is based not on the severity of her objective findings, but on her
well established diagnosis and her reported symptoms and limitations. In
addition, it is my opinion that there is a psychological component of her pain
complaints and other symptoms. It is difficult to separate out the symptoms
that are caused by the fibromyalgia syndrome and the symptoms related to

01 psychological factors, but it is clear that psychological factors increase her
02 physical symptoms, including her pain and fatigue, and contribute to her poor
03 stress tolerance. Ms. Butts has . . . little insight into the relationship of
04 psychological factors on her physical symptoms, and as a result does not
appreciate the possible utility of counseling or other non-medical psychiatric
treatment. Unless this changes, it is probable that her symptoms will continue
to be disabling to her.

05 (AR 624-25.) Dr. Conrad also described his three plus years of treating plaintiff, including her
06 fibromyalgia diagnosis both prior to his treatment and by rheumatologist Dr. Anshul Pandhi,
07 and plaintiff's use of various medications. (AR 623-24.)

08 Similarly, and contrary to the Commissioner's suggestion, Dr. Asher explained the
09 basis for his opinions, pointing to his review of the medical record, including the extensive
10 treatment records from Group Health Cooperative, the evaluation by Dr. Neims,⁴ the
11 November 2009 statement from Dr. Conrad, Dr. Pandhi's evaluation, and various other exhibits
12 in the record. (AR 90-112.) Dr. Asher also noted his review of reports completed by plaintiff
13 and her mother, and his consideration of plaintiff's testimony. (*Id.*)

14 As argued by plaintiff, the Commissioner appears to place undue emphasis on the need
15 for objective evidence of plaintiff's fibromyalgia. *Benecke*, 379 F.3d at 594 (finding ALJ
16 erred by "effectively requiring "objective" evidence for a disease that eludes such
17 measurement.") (quoting *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2d Cir. 2003)
18 (reversing and remanding for an award of benefits where the claimant was disabled by
19 fibromyalgia)). Fibromyalgia symptoms "include chronic pain throughout the body, multiple
20 tender points, fatigue, stiffness, and a pattern of sleep disturbance that can exacerbate the cycle
21 of pain and fatigue associated with this disease." *Id.* at 589-90. Fibromyalgia "is diagnosed

22 4 Dr. Asher mistakenly referred to Dr. Neims as Dr. "Nyes." (*See, e.g.*, AR 100.)

01 entirely on the basis of patients' reports of pain and other symptoms[.]" and "to date there are
02 no laboratory tests to confirm the diagnosis." *Id.* at 590. The "rule of thumb" for diagnosing
03 fibromyalgia is that a patient have pain in at least eleven out of eighteen "tender spots[.]" fixed
04 locations on the body "that when pressed firmly cause the patient to flinch." *Sarchet v. Chater*,
05 78 F.3d 305, 306 (7th Cir. 1996).

06 The record in this case supports both plaintiff's diagnosis of fibromyalgia and her long
07 and consistent reporting of her fibromyalgia symptoms. (*See, e.g.*, AR 549-50 (Dr. Pandhi
08 noted twelve out of eighteen tender points on examination) and AR 397-402, 498, 519, 527,
09 537-38, 543-45, 557-59, 569-71, 634, 638, 697, 705, 713-20, 732-41 (examples of plaintiff's
10 reports of her fibromyalgia-related symptoms to Dr. Conrad and other providers at Group
11 Health Cooperative).) *See also Benecke*, 379 F.3d at 594 (noting every rheumatologist who
12 treated the claimant diagnosed her with fibromyalgia and that the claimant "consistently
13 reported severe fibromyalgia symptoms both before and after diagnosis"). The record also
14 contains, as conceded by the Commissioner, inadequately evaluated testimony from both
15 plaintiff and her lay witness (AR 45-88, 232-39), as well as a report from Dr. Hughes
16 diagnosing plaintiff with a pain disorder and assessing her as chronically mentally ill (AR
17 815-20).

18 Additionally, while the Commissioner accurately notes that opinions as to disability are
19 reserved to the Commissioner, this fact does not undermine the validity of the opinions of the
20 treating and examining physicians; instead, such opinions are not "entitled to controlling
21 weight or special significance." Social Security Ruling (SSR) 96-5p. "If the case record
22 contains an opinion from a medical source on an issue reserved to the Commissioner, the

01 adjudicator must evaluate all the evidence in the case record to determine the extent to which
02 the opinion is supported by the record.” *Id.* In this case, as discussed above, the record
03 contains sufficient support for the opinions proffered by Drs. Neims, Conrad, and Asher.

04 Finally, it should be noted that the only contrary medical opinions in the record came
05 from a reviewing State agency medical expert (AR 428 (affirming report by non-medical
06 personnel at AR 374-81)) and consultative examiner Dr. James Crew (AR 369-73). However,
07 in addition to the fact that Dr. Crew had no medical records to review, he considered only
08 plaintiff’s physical complaints and found plaintiff capable of medium exertional level work,
09 despite finding her to have sixteen out of eighteen tender points on testing for fibromyalgia.
10 (AR 369-73.) Also, the opinions of non-examining physicians are generally entitled to less
11 weight than treating or examining physicians, and “[t]he opinion of a nonexamining physician
12 cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either
13 an examining physician or a treating physician.” *Lester*, 81 F.3d at 830-31 (cited sources
14 omitted).

15 In sum, the Commissioner does not establish any outstanding issues or other need for
16 further consideration of plaintiff’s claim on remand. Remand is not appropriate simply to
17 allow the ALJ an opportunity to acquire information favorable to his position. *See generally*
18 *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1401 (9th Cir. 1988) (“In cases
19 where there are no outstanding issues that must be resolved before a proper disability
20 determination can be made, and where it is clear from the administrative record that the ALJ
21 would be required to award benefits if the claimant’s excess pain testimony were credited, we
22 will not remand solely to allow the ALJ to make specific findings regarding that testimony.”)

01 The record in this case contains a significant amount of medical evidence and opinions as to
02 plaintiff's impairments which the ALJ failed to sufficiently evaluate, including opinions which,
03 if credited as true, support a finding of disability. As such, this matter should be remanded for
04 an award of benefits.

05 **CONCLUSION**

06 For the reasons set forth above, this matter should be REMANDED for an award of
07 benefits.

08 DATED this 21st day of May, 2012.

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11 Mary Alice Theiler
12 United States Magistrate Judge
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